the prosecution and did not judge the witnesses properly and therefore his finding was bad. Cited were *Tengku Mahmood* v. *Public Prosecutor*[3] and *Rameswar Koer & Ors.* v. *Bharat Pershad Sahi.*[4] It would seem that the appellant is trying not only to deny all the material prosecution evidence but suggested, quite seriously, that everyone concerned in the case was fabricating evidence. This line of argument was taken to the extent even to suggest that the whole Department of Immigration was out to "fix" the appellant. The basis of this allegation was perhaps that portion *D* of the Disembarkation Card was asked for by the defence but was never produced by the prosecution. It is however in evidence that portion *D* of the Disembarkation Card had already been sent to the Tracking Unit of the Immigration Department in Kuala Lumpur. On examination of the evidence we felt that the attack on the prosecution evidence and the explanation by the appellant on what transpired on March 1, 1975 was too far-fetched.

(5) Finally, it was contended that the statement in the Special Pass (P6) that PW2 was holder of a Malaysian Passport was not false in a material point. According to the defence that statement was in fact immaterial having regard to the object for which the Special Pass was granted. According to *Sarkar,* Ninth Edition, Vol. 2, page 1613, a certificate must be false on a material point. The question what point was material must depend upon the nature and object of the certificate. The object of a Special Pass is seen in Regulation 14(1) of the Immigration Regulations, 1963 as well as in the evidence of PW5, the Senior Assistant Controller of Immigration, Johore Bahru. According to Regulation 14(1) a Special Pass may be issued for any of the three purposes set out, namely —

(a) to afford an opportunity of making enquiry for the purpose of determining whether such person is entitled to an Entry Permit or otherwise entitled to enter the Federation; or

(b) in order to afford such person a reasonable opportunity of prosecuting an appeal against the decision of the Controller of Immigration; or

(c) for any other special reason.

PW5 in his evidence stated that a Special Pass may also be issued in case of doubt. In the case of the Special Pass (P6) issued to PW2, PW5 said that the reason for issuing it was "for further clearance." It is clear that the statement "Holder of Malaysian Passport" in P6 purports to indicate the status of PW2 and is therefore highly material although false. We therefore disagreed with Mr. Palasuntharam.

As pointed out earlier, the learned Magistrate's finding was upheld by the learned appeal judge in his grounds of judgment. We have gone through the evidence thoroughly ourselves and have come to the same conclusion. Where there have been concurrent findings of facts in the lower courts it should not be made a practice in the appeal court to review these concurrent findings of facts unless it is shown that there was no evidence to support the inferences drawn in the lower courts. Two Privy Council cases are relevant on this point. The first is *Wong Thin Yit* v. *Mohamed Ali*[5] where in a short judgment Lord Diplock said that it was not the practice of the Privy Council to review concurrent findings of facts from courts in Malaysia and dismissed the appeal. In *Hitam bin Abdullah* v. *Kok Foong Yee (f) & Anor.*[6] this point was dealt with in slightly more depth by Sir Harry Gibbs. In his judgment his Lordship emphasised that "It is very well established that as a general rule, their Lordships' Board will decline to interfere with the concurrent findings of two courts on a pure question of fact." The judgment went on as follows:—

"The nature of the exceptions that will justify a departure from the Board's settled practice are set out in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* [1946] A.C. 508 at page 521. Lord Thankerton there said:

'That in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure'."

He defined "miscarriage of justice" and then continued:

"That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

We therefore dismissed the appeal and restored the conviction recorded by the learned Magistrate. We were not satisfied that the sentences were wrong either in law or that they were manifestly excessive or inadequate on the facts and in the circumstances of the case. We therefore also restored the sentences.

Appeal dismissed.

Solicitor: *V.K. Palasuntharam.*

P.J.T.V. DENSON (M) SDN. BHD. & ORS. v. ROXY (MALAYSIA) SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman F.J., & Abdul Hamid J.) March 14 & April 9, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 148 of 1978]

Practice and Procedure — Execution of judgment against company — Land bought by company but registered in names of directors — Action for declaration that land is property of company against which judgment might be executed — Intent to defraud and defeat creditors.

Land Law — Land registered in names of directors of company — Whether title indefeasible — Fraud — Transfer set aside — National Land Code, s. 340.

Company Law — Directors — Land transferred to directors — Whether directors trustees — Specific Relief Act, 1950 — Companies Act, 1948, s. 20.

In this case the respondent had obtained judgment against the first appellant but the judgment was unsatisfied. The first appellant had agreed to buy land in Petaling Jaya and the sale agreement stipulated a transfer to the first appellant or its nominees. Subsequently the land was registered in the names of the second and third appellants, the directors of the first appellant. The respondent brought the action claiming a declaration that the land was the property of the first appellant against which the judgment might be executed. The de-

fence of the first appellant was a denial of ownership and that the land was bought by the second and third appellants with their own money. The learned trial judge gave judgment for the respondent as he held in effect that the transfer was voluntary and in fraud of the judgment creditors. The appellants appealed.

Held: (1) the learned trial judge was correct in holding that the transfer of the land was voluntary and in fraud of the judgment creditors;

(2) the transfer could be set aside despite its registration, as fraud had been brought home to the persons whose registered title was impeached;

(3) in this case the second and third appellants held the said land in trust for the first appellant, whose property it was.

Cases referred to:-

(1) *Freeman* v. *Pope* (1870) 5 Ch. App. 538.
(2) *Cadogan* v. *Kennett* 98 E.R. 1171.
(3) *Reese River Silver Mining Co.* v. *Atwell* (1869) L.R. 7 Eq. 347.
(4) *Green* v. *Nixon* (1857) 23 Beav. 530 & 535; 53 E.R. 208.
(5) *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* [1926] A.C. 101 & 106.
(6) *Regal (Hastings) Ltd.* v. *Gulliver* [1967] 2 A.C. 134, 139.
(7) *The Great Luxembourg Railway Co.* v. *Sir William Magnay* (1858) 25 Beav. 586; 53 E.R. 761.
(8) *In re Forest of Lean Coal Mining Co.* (1878) 10 Ch. D. 450.
(9) *Ex parte James* (1803) 8 Ves. 337 & 345; 32 E.R. 385.
(10) *Keech* v. *Sandford* Sel. Cas. T. King 61; 25 E.R. 223.

FEDERAL COURT.

C.V. Das for the appellants.

K. Anantham for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): On June 6, 1974 the respondent obtained judgment against the first appellant in the sum of $95,611.34. It lay unsatisfied. Only $1,906 was recovered by garnishment. Execution proceedings by way of judgment debtor summons were taken but proved abortive. On June 1, 1973 the first appellant had entered into a sale agreement for the purchase of a piece of land in Petaling Jaya measuring 1,540 sq. ft. ("the said land") for $15,000 and had paid a deposit of $5,000. The sale agreement stipulated a transfer to the first appellant or its nominee or nominees, the usual conveyancing phrase. On March 3, 1975 the court approved the sale. On October 13, 1975 the said land was registered in the names of the second and third appellants, the directors of the first appellant, in equal half shares.

On April 12, 1976, the respondent brought an action against all three appellants and another director claiming, *inter alia*, a declaration that the said land is the property of the first appellant against which the judgment might be executed.

The first appellant entered a defence denying ownership of the said land. It admitted entering into a sale agreement but averred that it did not complete the purchase because of lack of funds, and that the second and third appellants bought it with their own money. Quite predictably the second and third appellants raised the same line of defence. The third director did not appear or deliver any defence.

The learned judge rejected the defence as incredible. He found as a fact that the substitution of the second and third appellants for the first appellant was alleged to be backed by a resolution of the directors, incidentally the second and third appellants, the existence of which was at one time denied, but was subsequently produced in circumstances which would not vouch for its authenticity. He found that it lacked the certification by the company's secretary or secretaries. What the learned judge meant, so we understand, was that the transfer was voluntary and in fraud of the judgment creditors. He therefore gave judgment for the respondent.

The learned judge's findings were challenged. It was said that the weight of the evidence showed that the transfer was not voluntary, but for consideration, and that there was no evidence of fraudulent intent. We are of the view that the appellants' position as on October 13, 1975 when the transfer was made is relevant. The judgment had been entered on June 6, 1974, some sixteen months earlier; it was unsatisfied. They had done nothing to satisfy their liability under the judgment; the transfer was made in circumstances which gave rise to suspicion over its *bona fides;* it did not specify the consideration. It was, of course, open to the appellants to show what consideration was paid for it, but they chose not to do so beyond producing a sham resolution. They evidently hoped to convince the learned judge that the respondent had not proved its case. The hope was misconceived. He was not convinced.

In our opinion the inevitable result of the transfer of the said land on October 13, 1975 when taken together with all the surrounding circumstances was to defeat any attempt to execute the judgment. The present case falls squarely within the line of authorities exemplified by *Freeman* v. *Pope*[1] where Lord Hatherley L.C. said (at page 541): "But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which substracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute." The statute referred to is 13 Elizabeth 1 c.5, the predecessor of the (U.K.) Law of Property Act, 1925 which has been said to be merely declaratory of the common law, i.e. to prevent debtors disposing of their property to the prejudice of their creditors (see *Cadogan* v. *Kennett*[2]). "The principle on which the statute of 13 Elizabeth 1 c.5 proceeds," said Lord Hatherley in *Freeman* v. *Pope* (*supra*, page 540), " is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made." That case is illustrative of the principle that the onus is discharged by inference from the known facts. Therefore, where the surrounding circumstances are capable of establishing a *prima facie* case of intent to defraud, the onus shifts on the appellants to disprove this if it can; and the fact that the transfer was voluntary makes the task of upholding it all the more difficult. The

challenge to the learned judge's finding that the transfer was voluntary and in fraud of the judgment creditors therefore fails.

It does not follow, however, that the transfer of the said land was ineffective. The transfer was completed, of course, before any attempt was made by the judgment creditors to impeach the transfer; and the transfer is not then void, but voidable, that is to say, unless and until it intervenes by levying execution or taking legal proceedings. Thus Lord Romilly M.R. in *Reese River Silver Mining Co.* v. *Atwell*[3] said (at page 352): "But as soon as the court finds that a deed has been executed for the purpose of delaying, hindering, or defrauding creditors, and that it comes within the statute, it sets the deed aside, but it goes no further; and the plaintiffs must take some independent proceedings if they wish to have execution against the property in this deed."

As it stands the registered title of the said land in the hands of the second and third appellants is indefeasible. The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. Therefore the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in that land unless the party who acquires the registered title has been guilty of fraud (see section 340(2)(a) of the National Land Code). In that event the person who has been deprived of his unregistered interest will be entitled, as against the fraudulent party, to have the transfer set aside. The suggestion that the provisions of section 20 of the Companies Act, 1948 is applicable cannot be accepted here as that section only deals with acts of the company in excess of the powers conferred by the articles and memorandum of the company and not the commission of illegal acts. The ability of the company to transfer its assets is undoubted and under this section 20, the transfer once effected cannot be declared invalid merely because the company as transferor acted without capacity or power. But the section has, in our view, absolutely no relevance where the transfer or conveyance is sought to be set aside as being in fraud of its creditors. In such an application, the question before the trial court is one of fact, whether the transfer is or is not in fraud of creditors.

Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean "actual fraud, i.e. dishonesty of some sort" for which the registered proprietor is a party or privy. "Fraud is the same in all courts, but such expressions as 'constructive fraud' are . . . inaccurate;" but "'fraud' . . . implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled." (*per* Romilly M.R. in *Green* v. *Nixon*[4]). Thus in *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.*[5] it was said that "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent. . . ."

Upon a true perspective of the facts, we are satisfied that "fraud had been brought home to the person whose registered title is impeached." The first appellant was substantially indebted to the judgment creditor as on June 6, 1974. It was as at that date in a position of tight liquidity. It did not have its own funds sufficient money to cover its financial commitments. In the meanwhile court proceedings were brought to enforce the judgment but to no avail. Later the said land in which it had an interest was transferred to its two directors in circumstances which gave rise to suspicion over the *bona fides* of the transaction. It is our opinion that the transfer was a mere cloak to deprive the judgment creditor of recourse to the property which would otherwise be applicable for its benefit. If this was not a case of deliberate fraud on the judgment creditor, we do not know what is. In concluding this part of our reasons for judgment it is useful to refer to a passage from the judgment of Lord Mansfield in *Cadogan* v. *Kennett* (*supra*, page 1172):

"One case was, where there had been a decree in the Court of Chancery and a sequestration. A person with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them. The court said, the purchase being with a manifest view to defeat the creditor, was fraudulent, and therefore, notwithstanding a valuable consideration, void. — So, if a man knows of a judgment and execution, and, with a view to defeat it, purchases the debtor's goods, it is void: because, the purpose is iniquitous. It is assisting one man to cheat another, which the law will never allow."

In the result, the respondent succeeds in setting aside the transfer.

The crucial question now is the ownership of the said land. If it is the property of the first appellant, which is the case of the respondent, then it is available to the respondent for execution. Our view is that the second and third appellants were trustees and they held the said land in trust for the first appellant. We say it for this reason. At all material times the second and third appellants were directors and in a fiduciary relationship to the company, the first appellant. (See *Regal (Hastings) Ltd.* v. *Gulliver*[6]). And by virtue of the Specific Relief Act, 1950 (Revised — 1974) they were trustees. A "trustee" is defined in that Act as including every person holding expressly, by implication or constructively, a fiduciary character. As such they had attached to them, for the benefit of the shareholders, all the liability and duties which attached to a trustee and agent (see *The Great Luxembourg Railway Co.* v. *Sir William Magnay*[7]). "Again directors are called trustees. They are no doubt trustees of assets which have come to their hands, or which are under their control." — (*per* Sir George Jessel M.R. in *In re Forest of Dean Coal Mining Co.*[8]). As trustees they could not purchase the said land. The inflexible rule of equity forbade them to do that. "This doctrine as to purchase by trustees, assignees, and persons having a confidential character, stands much more upon general principles than upon the circumstances of any individual case. It rests upon this: that the purchase is not permitted in any case however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases." (*per* Lord Eldon L.C. in *Ex parte James*[9]). They no doubt could purchase only with full knowledge and consent of their *cestui que* trust. In the absence of such knowledge and consent they were accountable: see *Keech* v. *Sandford*[10] and *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*. The allegation that the company

lacked the funds to purchase and that the second and third appellants bought the said land with their own money as members of the public is a travesty of the facts. The same argument was raised and rejected in *Regal (Hastings) Ltd.* v. *Gulliver, supra.* Lord Russell of Killowen said (at page 149): "It was contended that it was impossible for Regal to get the shares owing to lack of funds and that the directors in taking the shares were really acting as members of the public. We cannot accept this argument. It was impossible for the *cestui que* trust in *Keech* v. *Sandford, supra,* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain."

We would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

MURUGAN v. LEW CHU CHEONG

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Abdul Hamid F.JJ.) March 14 & April 16, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 96 of 1978]

Tort — Negligence — Road accident — Finding by trial court — Appeal on question of fact — No reason to interfere with decision of trial judge.

Practice and Procedure — Finding of fact by trial judge — Appeal — No reason to interfere with decision of trial judge — Highway Code, r. 18.

Evidence — Failure to call witness — Reasonable explanation — Evidence Act, 1950, s. 114(g).

This was an appeal from the decision of Chang Min Tat F.J., sitting in the High Court, in which he found the appellant was totally to blame for the accident which occurred between the respondent's motorcar and the appellant's motor cycle. The learned trial judge found that the appellant had cut across the right in circumstances which give the car no room or chance to pass it on its right. The appellant appealed. The appeal was on questions of fact.

Held: the appellant had failed to establish that there was any error of fact or law or that there was a misdirection of himself by the judge to warrant an interference of the decision by the appeal court.

HIGH COURT.

Tara Singh Sidhu (*K. Pasupathy* with him) for the plaintiff.

V.P. Nathan for the defendant.

Cur. Adv. Vult.

Chang Min Tat F.J.: The accident between the motor-cyclist plaintiff and the defendant motorist occurred when the motor-cyclist cut across the path of the following motorist in turning to a side road on the right. It took place almost on the crown of the road.

The question as always is liability for the accident.

The motor-cyclist said he was travelling on his left side of the road. When about 30 yds. from the junction, he gave a right-hand signal. By this signal, he intended to indicate his intention to turn right. At this time he was aware of a car behind him. He had turned round to look and he estimated it to be some 90 yards behind him. Then after proceeding some 5-10 yards or so, he commenced to turn.

His evidence was to a certain extent corroborated by two persons who were at the road side waiting for a bus. They were on the same side and were waiting for a bus coming from the direction of the motor-cycle. Because of this, they said, they were looking in his direction. They therefore saw the way events developed leading to the accident. There were some minor discrepancies in the assessments of distances. These were to be expected. But there was one discrepancy of some importance. Jamaruddin PW3 largely agreed with the plaintiff. Letchuman, PW2, the other of the two bystanders, however, did not agree that the motor-cyclist moved from the left side before the junction was reached. The witness said the motor-cyclist turned from the left side of the road at a point directly opposite the side road. The defendant charged the plaintiff with suddenly turning across his path. He would therefore appear to have been supported by Letchuman.

The question whether the motor-cyclist suddenly turned across the motorist's path is, in my view, crucial to the question of liability for the accident. If as the motor-cyclist said, he had turned gradually to the middle portion of the road, in order to turn into the side road leading to Roswell Estate, long before the motor-car had come up to him, he would have left ample room for the car to pass him on his left. There would be no necessity for the motorist to turn to the right and run down the motor-cyclist either from behind or from the side. On the other hand, if the motor-cyclist had suddenly turned across the motorist's path, he would have compelled the motorist to take evasive action by swerving to his right and if in certain circumstances, the action he took was not sufficient to avoid the accident, it would not be his fault.

But before this question could be answered, I have to consider the credibility of the motorist as a witness. I appreciate of course that in a clear sense, both he and the plaintiff are interested witnesses. In this case I was therefore more than a little surprised that in his examination-in-chief, he claimed he had no time to apply his brakes. He meant he did not apply his brakes at any time. I was surprised because the indications on the sketch were clearly that he had. The motorist's admission of course was such as not to invite cross-examination, but in fairness to him, as I considered it, since his counsel failed to show him the sketch, I did so, but he still maintained he did not. As a party to the action, he was therefore either a witness who was unconcerned about the outcome of the case or one who was not prepared to say anything that he could not really or truly remember. On my view of him, I prefer to regard him in the latter category.

The answer to the question which I have to decide lies, I think, in the "uncontrovertible evidence"